



Strasbourg, 28 November 2011

Opinion no. 653/2011

CDL(2011)095*
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION
ON THE DRAFT LAW
ON THE LEGAL REGIME OF THE STATE OF EMERGENCY
OF ARMENIA

On the basis of comments by
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I. Introduction

1. By a letter of 9 November 2011, the Minister of Justice of Armenia requested the opinion of the Venice Commission on the draft law on the legal regime of the state of emergency of Armenia (CDL-REF(2011)058, hereinafter “the draft law”). On 21 November 2011, the Ministry provided the English translation of the rationale for the said law.
2. Messrs van Dijk and Tuori acted as rapporteurs. They analysed the English translation of the draft law which was provided by the authorities. The present opinion, which was based on their comments, was adopted by the Venice Commission at its ... Plenary Session (Venice, ...).

II. Background

3. Armenia adopted a new constitution in 2005. The Venice Commission assisted in that process (CDL-AD(2004)044, §§ 34-38) and examined *inter alia* a draft version of Article 55 §13 and §14, which read as follows:

[The President]

13) in the event of an armed attack against or of an immediate danger to the Republic, shall declare a state of emergency and may call for a general or partial mobilization and shall decide on the use of the armed forces. During warfare The President may appoint or dismiss from the office the Highest Commandant. The law shall define the legal regime of martial law

14) in the event of an imminent danger to the constitutional order, after consulting with the Chairman of the National Assembly and the Prime Minister, shall take measures appropriate in the given circumstances and address the people on the situation.

4. The Commission found these draft provisions on the procedure for declaring martial law and the state of emergency problematic, in that they did not allow to clearly distinguish between a) martial law, b) a state of emergency and c) the measures taken in the event of an imminent danger to the constitutional order. In addition, “the appropriate measures” that the President could take in the event of an imminent danger to the constitutional order were not preceded by a declaration of a state of emergency, nor was the scope of the measures defined anywhere in the proposed new Constitution. The Commission further noted that the proposed Article 44 of the Constitution on restrictions to fundamental rights and freedoms referred only to martial law and a state of emergency, while both the European Convention on Human Rights (ECHR) and the UN Covenant on Civil and Political Rights instead require that a state of emergency, allowing for derogations from human rights, be expressly declared and that a notification be sent to the respective Secretary General. The earlier 2001 draft constitution (Article 55 § 15) indeed required the declaration of an “extraordinary situation”, before the President could use the armed forces or declare martial law.

5. The Venice Commission further stressed the necessity of an active involvement of the National Assembly in the determination of the reasons and proportionality of the emergency measures as well as the persistence of the danger requiring the use of emergency powers. The draft provisions were insufficient and inadequate in this respect: it was necessary to provide that a special session of the National Assembly needed to be convened immediately after the declaration of both martial law and an emergency situation, in order to examine the correspondence of the measures undertaken with the situation. The mere consultation by the President with the Chairman of the National Assembly and the Prime Minister prior to taking appropriate measures was not sufficient. The Venice Commission recommended revising these draft provisions.

6. Paragraphs 13 and 14 of Article 55 were subsequently revised in the first reading, and read:

[The President]

13) in the event of an armed attack against the Republic, an imminent danger thereof or declaration of war, shall declare a martial law and may call for a general or partial mobilization and shall decide on the use of the armed forces. During warfare the President may appoint or dismiss from the office the Highest Commandant.

In case of use of the armed forces or declaration of martial law a special sitting of the National Assembly shall be convened by force of law.

The law shall define the legal regime of martial law.

14) in the event of an imminent danger to the constitutional order, after consulting with the Chairman of the National Assembly and the Prime Minister, shall declare state of emergency and take measures appropriate in the given circumstances and address the people on the situation.

In case of declaration of the state of emergency a special sitting of the National Assembly shall be convened by force of law.

The law shall define the legal regime of the state of emergency.

7. The Venice Commission found (CDL-AD(2005)016, § 16) that some improvements had been made, to the extent that a more significant role of the National Assembly had been provided for the procedure for declaring martial law and the state of emergency.

8. The final version of Article 55 §§ 13 and 14, as adopted by the Armenian parliament and currently in force, was not further amended.

9. The draft law under consideration aims at implementing Article 55 para. 14 (“The law shall define the legal regime of the state of emergency”), pursuant to Articles 6 and 117 of the Constitution.

III. General Standards relating to the state of emergency

10. The European standard¹ concerning the proclamation of a state of emergency which allows for derogation of certain fundamental rights and freedoms, is laid down in Article 15 ECHR, which reads as follows:

Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 § 1 and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

11. In relation to that provision, the European Court of Human Rights (ECtHR) has held that it falls to each Contracting State, with its responsibility for the life of the nation, to determine whether that life is threatened by a public emergency and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. Accordingly, in this matter a wide margin

¹ Article 4(1) of the International Covenant on Civil and Political Rights (ICCPR) is expressed in terms very similar to those of article 15(1) ECHR.

of appreciation should be left to the national authorities. However, they do not enjoy an unlimited power of appreciation. It is for the ECtHR to rule on whether they have gone beyond the "extent strictly required by the exigencies" of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision².

12. Article 18 of the ECHR contains a guarantee against the application of measures that restrict human rights and freedoms, such as measures taken on the basis of a state of emergency, "for any purpose other than those for which they have been prescribed".

13. The Venice Commission has studied the legal regime of the state of emergency in its Study on Emergency Powers³ and in its Opinion on the Protection of Human Rights in Emergency Situations⁴. It has further addressed the control of the armed forces in emergency situations in its Study on the Democratic Control of the Armed Forces⁵.

IV. Constitutional background

14. The Armenian Constitution relies on a distinction between martial law and state of emergency. These are dealt under Article 55 paragraphs 13) and 14) of the 2005 Constitution, which regulates the powers of the President of the Republic.

15. In addition, Article 44 of the Constitution provides for the possibility of temporarily restricting fundamental and human rights in cases of martial law and state of emergency. This provision reads as follows:

Article 44

Special categories of fundamental human and civil rights, except for those stipulated in Articles 15, 17-22 and 42 of the Constitution may be temporarily restricted as prescribed by the law in case of martial law or state of emergency within the scope of the assumed international commitments on deviating from commitments in cases of emergency.

16. In Articles 43-44, the Constitution of Armenia has adopted the distinction between *limitations* on and *derogations* from human and fundamental rights, although this is obscured by the use of identical terminology ("may be temporarily restricted") in both provisions. Article 43 provides for *limitations* in the sense of, e.g., the second paragraph of Article 8 of the European Convention on Human Rights (ECHR), whereas Article 44 relates to *derogations* in the sense of Article 15 ECHR.

17. Armenia is a Signatory State of both the ECHR and the ICCPR. Thus, the reference in Article 44 of the Constitution of Armenia is, above all, to Article 15 of the ECHR and Article 4 of the ICCPR. Furthermore, the draft law under examination includes a general reference not only to the Constitution, but also (Article 2) to "the international treaties of the Republic of Armenia" (*i.e.* the relevant treaties that are binding on the Republic of Armenia).

² ECtHR, Ireland v. the United Kingdom, judgment of 18 January 1978, § 207; Brannigan and McBride v. the United Kingdom, judgment of 26 May 1993, § 43; Aksoy v. Turkey, judgment of 18 December 1996 § 68; A and others v. United Kingdom, judgment of 19 February 2009, § 173.

³ Venice Commission, Study on Emergency Powers, CDL-STUD(1995)012, [http://www.venice.coe.int/docs/1995/CDL-STD\(1995\)012-e.asp](http://www.venice.coe.int/docs/1995/CDL-STD(1995)012-e.asp)

⁴ Venice Commission, Opinion on the protection of human rights in emergency situations, CDL-AD(2006)015, [http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)015-e.pdf](http://www.venice.coe.int/docs/2006/CDL-AD(2006)015-e.pdf)

⁵ Venice Commission, Study on the democratic control of the armed forces, CDL-AD(2008)004, <http://www.venice.coe.int/docs/2008/CDL-AD%282008%29004-e.asp>, paras 244-253.

V. Analysis of the draft law

18. Article 1(1) of the draft law contains the definition of state of emergency that reads:

State of emergency is a special legal regime regulating activities of public administration and local self-government bodies, legal entities (irrespective of their legal form) and their officials, which is declared pursuant to the Constitution of the Republic of Armenia throughout the territory of the Republic of Armenia or in certain territories thereof.

19. In the opinion of the Venice Commission, this definition would benefit from further clarification. The concept of "activities of public administration" is rather vague. From the second paragraph of Article 7 of the draft, it appears that this concept does not include laws and judicial acts. Does the latter restriction apply to laws adopted and judicial decisions taken only, or also to future legislative and judicial activities? The concept of "legal entities (irrespective of their character and legal form)" would also seem to be not specific enough.

20. Article 1(2) of the draft law explicates through examples the circumstances that constitute an imminent danger to the constitutional order. These include, in particular, "any attempt of violent change or overthrow of the constitutional order of the Republic of Armenia, seizure or usurpation of power, armed disturbances, mass disorder, terrorist acts, seizure or blockage of objects of special significance, arrangement and operation of illegal armed groups, national, racial and religious conflicts accompanied by violent actions, imminent threat to human life and health".

21. It is to be emphasised that the circumstances where a state of emergency can be declared must also fulfill the criteria of the condition of a "public emergency threatening the life of the nation" established by Article 15 of the ECHR and Article 4 of the ICCP. The concept of "imminent danger to the constitutional order" is therefore to be interpreted in a restrictive manner, in the sense of a threat to the life of the nation. The specification which follows in Article 1(2) after "in particular" would seem to be the correct delimitation of the dangers that may justify a proclamation of a state of emergency. Therefore, it is recommended to substitute the words "in particular" by the words: "consisting of" or words of the same import. In this way the same words "imminent danger/threat to the constitutional order of the Republic of Armenia" in the Constitution and in other provisions of the draft will also be duly specified.

22. In relation to the state of emergency, the Venice Commission recalls that it is essential that the constitution and the legislation provide mechanisms – notably parliamentary and judiciary oversight over the executive - for preventing the abuse of emergency powers by national authorities⁶. This fundamental principle is reaffirmed in Parliamentary Assembly of the Council of Europe Recommendation 1713(2005), stating that 'exceptional measures in any field must be supervised by Parliaments and must not seriously hamper the exercise of fundamental constitutional rights⁷.

23. Article 3(1-2) of the draft law repeats the requirement contained in Article 55(14) of the Constitution that the President consult the Chairperson of the National Assembly and the Prime Minister before declaring a state of emergency and that, after the declaration, a special sitting of the National Assembly must be immediately convened. The words "in consultation with" in the English translation are not totally clear: they could mean "in agreement with", but also "after consultation with". If the original text creates the same lack of clarity, it is advised to clarify the text, since these words are highly important for the democratic basis of the declaration concerned.

⁶ See Venice Commission, Study on the democratic control of the armed forces, cit., paras. 244, 252.

⁷ Parliamentary Assembly of the Council of Europe, Recommendation 1713(2005), Democratic oversight of the security sector in member States, point Vb

24. Further, the consequences of the outcome of the special session of the National Assembly should be specified (see also the observation concerning Article 6, paragraph 2).

25. Article 3(2) provides for the duty to inform diplomatic representations as well as representations of international organisations about the declaration of a state of emergency. It is recommendable that the obligation to inform the Secretary General of the Council of Europe (Article 15(3) of the ECHR) and the Secretary General of the United Nations (Article 4(3) of the ICCP) be explicitly mentioned.

26. In Article 5 (1) concerning the “effective period of the state of emergency”, it may be advised for the sake of clarity to specify that the declaration shall not enter into force retroactively.

27. Article 6 (1) relates to the conditions and procedure for the termination of the state of emergency. Since paragraph 1 of Article 15 of the ECHR provides that the derogation from the obligations under the ECHR is allowed only “to the extent strictly required by the exigencies of the situation”, the word “Where” should read in the English translation: “As soon as”. Further, it may be advised to specify that the President may decide to terminate the state of emergency on his or her own motion or on the recommendation of the Chairperson of the National Assembly or the Prime Minister.

28. The Venice Commission recalls that parliamentary ratification of the decision of the executive to declare a state of emergency is the first available control mechanism. As a general rule, the executive must provide a well-considered justification both for their decision to declare a state of emergency and for the specific measures to address the situation. Most Parliaments also have the power to review the state of emergency at regular intervals and to suspend it as necessary. Furthermore, the post hoc general accountability powers of Parliament, *i.e.* the right to conduct inquiries and investigations on the execution of emergency powers, are extremely important for assessing government behaviour⁸.

29. Article 6 (2) of the draft law provides that the National Assembly may revoke the state of emergency. It also provides that the National Assembly may revoke individual actions taken in a state of emergency. This is welcome from the point of view of parliamentary control of the use of emergency powers. Since Article 3(2) of the draft law (like Article 55 (14) of the Constitution) provides that in case of a declaration of a state of emergency, a special sitting of the National Assembly shall be immediately convened, a provision should be added according to which the Presidential Decree declaring a state of emergency or its prolongation shall be immediately submitted to the National Assembly, which will decide on whether the Decree as a whole or its individual provisions will remain in force.

30. Article 7 (1) of the draft law lists the measures which may be taken in a state of emergency and which are not included in the initial Decree declaring the state of emergency. This provision leaves open the legal form in which these measures are decided upon. Article 55(14) of the Constitution intimates that the powers at issue belong to the President: Article 7 should explicitly stipulate that the President exercises his/her powers through Presidential Decrees. If the intention is to allow for normative acts by other bodies than the President, this should be spelled out in the law and made dependent on a precise delegation through a Presidential Decree.

31. Article 7(1.13) authorises “the suspension or termination of activities of the political parties obstructing the elimination of the circumstances having served as a ground for declaration of state of emergency, pursuant to Article 80 of the Law of the Republic of Armenia “On

⁸ See Venice Commission, Study on the democratic control of the armed forces, *cit.*, para. 252

Constitutional Court". This provision is problematic. It must be stressed that "the prohibition or dissolution of political parties as a particularly far-reaching measure should be used with utmost restraint" and that "the prohibition or enforced dissolution of political parties may only be justified in the case of parties which advocate the use of violence or use violence as a political means to overthrow the democratic constitutional order, thereby undermining the rights and freedoms guaranteed by the constitution".⁹

32. In addition, in view of the second paragraph of Article 6 of the draft which regulates the power of the National Assembly to initiate the termination of the state of emergency, it should be noted that each political party represented in the National Assembly must remain able to promote in a peaceful way such action by the National Assembly.

33. Article 7(1.13) contains a reference to Article 80 of the Law on the Constitutional Court; this reference is not clear, since the review provided there requires an oral procedure, while paragraph 7 of Article 80 fixes the period within which the Constitutional Court has to reach a decision on a maximum of three months. Consequently, the procedure of Article 80 cannot be followed in most cases. The Venice Commission recalls in this respect that "the prohibition or dissolution of a political party should be decided by the Constitutional court or other appropriate judicial body in a procedure offering all guarantees of due process, openness and a fair trial". This provision should be reconsidered.

34. Paragraph 2 of Article 7 provides for the power of the President, during a state of emergency, "to suspend the legal acts of state and local self-government bodies, with the exception of laws and judicial acts". The powers of the President are too broadly defined. In addition, these powers, too, should be used through Presidential Decrees. The scope and consequences of the exception concerning "laws and judicial acts" is not very clear: several of the measures listed in the first paragraph of Article 7 of the draft and several of the powers listed in Article 9 of the draft imply a temporary derogation from the law, which amounts in fact to a partial suspension of the law concerned. It is advised to reconsider or clarify this issue.

35. Article 7 (3) sets out the need for the actions taken in pursuant of the declaration of the state of emergency to respect the principles of necessity and proportionality. The words "proportionate to the mentioned purposes" would seem to leave more room for limitation than the words "extent strictly required by the exigencies of the situation" in Article 15 of the ECHR. It is advised to use the latter words.

36. As the National Assembly has the power to revoke individual actions taken in a state of emergency (see Article 6(2) of the draft law), Article 7 should make provision for the obligation for the President to submit immediately the Presidential Decrees issued under Article 7 to the National Assembly, which decides whether the Decrees and their individual provisions remain in force.

37. Article 8 of the draft law provides for establishing through a Presidential Decree a "Commandant's Office of Area" "for the purpose of eliminating the circumstances having served as a ground for declaring a state of emergency as well as settling other pressing issues". It is important that the Presidential Decrees defines precisely the powers of this office.

38. Article 9 of the draft law regulates the use of "the forces and means of the police, national security and defence, state authorised bodies" "for the purpose of ensuring the legal regime of the state of emergency". It should be expressly stated that these authorities may only act on the basis of the powers provided for by ordinary legislation or Presidential Decrees issued under this law. Such a provision could be combined with the present Article 12 of the draft law which

⁹ Venice Commission, Guidelines on prohibition and dissolution of political parties and analogous measures, CDL-INF(2000)001, [http://www.venice.coe.int/docs/2000/CDL-INF\(2000\)001-e.pdf](http://www.venice.coe.int/docs/2000/CDL-INF(2000)001-e.pdf).

provides that “In a state of emergency the conditions and limits of use of physical force, special means, arms and combat technology as prescribed by laws are not subject to amendment.” In relation to the regulation of physical force, it has to be observed that Article 15 (2) ECHR stipulates that no derogation shall be made from Article 2 (right to life), except in respect to deaths resulting from lawful acts of war, nor from Article 3 (prohibition of torture or inhuman or degrading treatment or punishment).

39. Article 10 sets out the “limits of Means Applied in the State of Emergency and Extent of Temporary Limitations”. It refers to the need for necessity and proportionality between the actions implementing the declaration of the state of emergency and the circumstances which prompted the declaration of the state of emergency, which is most welcome, although the wording is too broad and it would be more appropriate to refer to “the extent strictly required by the exigencies of the situation”. It is noted, however, that in this article, in the second paragraph, it is provided that the measures and limitations “shall be in line with the international commitments of the Republic of Armenia on derogating from obligations in emergency situations”. Article 10 partly overlaps with two other provisions on the principles of necessity and proportionality: Article 1(3) relating to the declaration of state of emergency and Article 7(3) relating to the limitations on rights and freedoms authorised by the law. It is vitally important that it be clearly guaranteed that the principles of necessity and proportionality have to be respected both when issuing Presidential Decrees and when applying them in individual cases.

40. The clarity of law could be improved by combining Article 7(3) and Article 10 into a single Article, pertaining both to the Presidential Decrees and their application in individual cases.

41. Article 10(2) of the draft law lays down that “under state of emergency the measures and temporary limitations provided for by this Law shall be in line with the international commitments of the Republic of Armenia on derogating from obligations in emergency situations”. This is also a most welcome provision. However, it is to be recommended that an explicit reference to the rights and freedoms that, according to Article 44 of the Constitution, Article 15 of the ECHR and Article 4 of the ICCP, may not at all be derogated from be included in Article 7(3) or 10(2).

40. Article 11, paragraphs 1 and 2 relates to the “Guarantees of the Rights of Natural and Legal Persons During the Effective Period of the State of Emergency”. The words “as prescribed by the Government of the Republic of Armenia” do not provide a strong guarantee of fair compensation. As far as “property” in the sense of Article 1 of the First Protocol to the ECHR is concerned, the case law of the ECtHR concerning fair compensation has to be taken into account.

41. Article 13, which regulates the procedure of arresting persons violating the rules of curfew, includes a provision which lays down that “a natural person may appeal the decision on the arrest in higher instances or through judicial procedure”. Especially where the right of *habeas corpus* is at stake, but also more in general the right of access to court has to be guaranteed. It is recommended to include a general provision to that effect, for example in Article 15. In this respect, the Venice Commission recalls that “next to Parliament, the judicial system plays a crucial role in the control of the executive’s prerogatives during states of emergencies, taking decisions on the legality of a declaration of a state of emergency as well as reviewing the legality of specific emergency measures. Moreover, the judicial system must continue to ensure the right to fair trial. It must also provide individuals with effective recourse in the event that government officials violate their human rights. In order to guard against infringement of non-derogable rights, the right to take proceedings before a court on questions relating to the lawfulness of emergency measures must be safeguarded through the independence of the judiciary”.¹⁰

¹⁰ See Venice Commission, Study on the democratic control of the armed forces, cit., para. 253.

42. Article 14 of the draft law correctly sets out the obligation for the authorities which issued measures under the state of emergency to repeal them immediately upon the termination of the state of emergency. The provision should indicate that the “relevant acts” should be taken promptly.

43. In Article 15, paragraphs 1 and 2, the words "as prescribed by the law of the Republic of Armenia" do not seem to provide any legal certainty. It is advised to include the main rules concerning liability in the Law on the Legal regime of the State of Emergency itself.

VI. Conclusions

44. The concept of emergency rule is founded on the assumption that in certain situations of political, military and economic emergency, the system of limitations of constitutional government has to give way before the increased power of the executive. However, even in a state of public emergency the fundamental principle of the rule of law must prevail. The emergency measures and derogations, restrictions and suspensions of fundamental rights are acceptable only in case of a public emergency threatening the life of the nation; furthermore, such measures should be proportionate to the emergency and should only last as long as the emergency itself. The rule of law further means that governmental agencies must operate within the framework of law, and their actions must be subject to review by independent courts. The legal security of individuals must be guaranteed.

45. The draft law on the legal regime of the state of emergency of Armenia, which aims at implementing Article 55 § 14 of the Constitution, contains several positive elements, notably the provision that the principles of necessity and proportionality need to be respected at all times, in line with the international obligations of Armenia.

46. The draft law also respects the fundamental principle that parliament may revoke the state of emergency or any individual measures taken by the executive under the state of emergency. The Venice Commission nevertheless recommends that, in order to fully guarantee the necessary democratic oversight of the powers of the executive under the state of emergency, provision be made for the duty to submit immediately the Presidential Decree declaring the state of emergency and any subsequent Presidential Decree containing measures to be taken under the state of emergency to the National Assembly for it to decide whether to ratify or revoke them or any part of them.

47. Further, provision should be made for a general right of access to court, in order to provide individuals with effective recourse in the event that government officials violate their human rights.

48. The provision on the power to suspend or terminate the activities of political parties (Article 7(1.13)) should be reconsidered.

49. The Venice Commission remains at the disposal of the Armenian authorities.